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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-503

RICHARD T. WHITCOMB, *Petitioner,*

v.

GENERAL DYNAMICS CORPORATION AND AMERICAN AIRLINES, INC., *Respondents.*

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Respondent's opposition says no more than what respondents ordinarily say—viz, this is an unimportant case of no general public interest because it is only a quarrel between private parties.

Such could also have been stated in:

Graham v. *John Deare Co.*, 383 U.S. 1 (1966)
Graver Tank & Mfg. Co. v. *Linde*, 335 U.S. 605 (1950)
United States v. *Adams*, 383 U.S. 39 (1966)
Sanitary Refrigerator v. *Winters*, 280 U.S. 30 (1929)

Temco Electric v. *Apco,* 275 U.S. 331 (1928)
Anderson's Black Rock v. *Pavement,* 396 U.S. 57 (1969)

While each of those cases involved a private quarrel between the litigants, as does this case, underlying that quarrel was a *legal issue* of great and *general* public importance. In each case certiorari was accordingly granted—granted, in fact, only two years ago *on the very question here presented,* in *Standard Industries* v. *Tigrett Industries,* 396 U.S. 885 (1969), see Petition page 3,—for the same compelling reasons as exist in this case for granting the writ.

Otherwise, Respondent merely proceeds to distort the holdings below and of the conflicting decisions by contending that

(1) the Court below did *not* hold non-infringement because of a supposed superior performance; and,

(2) the holdings of the conflicting Courts merely related to improvement devices falling within the literal scope of claims of a patent.

Not so on both points.

The Fourth Circuit below expressly stated it held non-infringement,

> "Because this is a case where . . . [the] alteration does add to the effectiveness of the device . . ." (A. 31)

Further, in the conflicting decisions of six other Circuits (Petition pages 12-18), the issues involved "improved" devices *outside* the *technical* language of the claims—but as to which each of those other cir-

cuits stated, *as has this Court,* that infringement under the Doctrine of Equivalents is *not* avoided merely because the alteration in an otherwise infringing device makes some improvement in its effectiveness for achieving the *same* function and purpose of the patent.

Respondent does not answer, and obviously has no answer to, that clear conflict.

Respondent also leaves unchallenged the fact that there is an *actual* difference of at most only 2%, a matter of about six inches, between forward extensions of the accused bodies and the bodies described in the patent (see Petition pages 23-24). These facts were established by clear *and unchallenged* testimony in open Court, but *ignored* by the Fourth Circuit below when it failed to read the patent claims in light of the patent specification. Respondent's only argument is to cite *Otto* v. *Koppers* (Opposition Brief, page 13) and to point out that the patent drawings in *that* case were shown *not* to be "scale" drawings and could thereby be ignored. No such evidence exists in the instant case.

There was no basis for the Fourth Circuit below to strip the "just forward" language of Whitcomb's patent of its intended meaning, and then completely re-word the claim to read "barely forward". The law has always held that a patentee "may be his own lexicographer and we add, his own grammarian", *Chicago Steel Foundry Co.* v. *Burnside Steel Foundry Co.,* 132 F.2d 812, 814 (7 Cir. 1943), and that his claims are to be construed with that in mind, so as to "*of course* read upon the [patentee's own] specification", *Reiner* v. *I. Leon Co.,* 285 F.2d 501, 504 (2 Cir. 1960).

This, the Fourth Circuit below did not do in this case.*

Petitioner again respectfully submits this Court should resolve the conflict between the circuits (as it had hoped to do in *Standard Industries*).

The instant case presents a particularly meritorious vehicle for it to do so.

Respectfully submitted,

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* Other points in Respondent's Opposition were thoroughly discredited below, including its allegation of an "*ex parte*" alteration of the Court's Finding 32 (when actually Judge MacKenzie himself authorized correction of a secretary's error in copying what were wholly *inter partes* papers); and its resurrected, but wholly unfounded, contention of file wrapper estoppel—an artificial issue confected solely out of a carefully-edited partial-sentence quotation.